FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-437

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare,

Appellant,

v.

CINDY WESTCOTT, et al.,

Appellees.

No. 78-689

ALEXANDER SHARP, II, Commissioner of the Massachusetts Department of Public Welfare,

Appellant,

v.

CINDY WESTCOTT, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE INDIVIDUAL AND CLASS APPELLEES

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OPINION BELOW

The April 20, 1978 opinion of the District Court (U.S. J.S. App. 1A-37A) which is the basis for the appeal in No. 78-437 has now been reported at 460 F. Supp. 737 (D. Mass. 1978). The August 9, 1978 order of the District Court (State U.S. App. 13a-14a) which is the basis for the appeal in No. 78-689 has not been reported.

QUESTIONS PRESENTED

In No. 78-437

Whether Section 407 of the Social Security Act, which authorizes payments of subsistence benefits to needy two-parent families with children deprived of parental support or care by reason of the unemployment of a father, but not by reason of the unemployment of a mother, violates the Due Process Clause of the Fifth Amendment.

In No. 78-689

If the answer to the prior question is yes, whether the appropriate remedy is extension of benefits to the excluded class of needy families with unemployed mothers, invalidation of the AFDC-U program resulting in termination of aid to hundreds of thousands of needy children and their parents, or a legislative restructuring of the AFDC-U program by this Court

to impose a principal wage earner test, terminate some current recipients, and extend benefits to some of those now impermissibly excluded.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. 607, sets out the gender classification at issue herein as follows:

> (a) The term "dependent child" shall . . . include a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father. . . .

The full text of section 407 is set out in the Appendix to the Brief for the Appellant in No. 78-437 (hereinafter U.S. Brief).

STATEMENT OF THE CASE

This class action challenges the constitutionality of the gender classification in the federal-state Aid to Families With Dependent Children of Unemployed Fathers (AFDC-U) program, an optional sub-program of the Aid to Families With Dependent Children

(AFDC) program. Under the AFDC-U program, federal matching funds are available for state AFDC payments to needy families with children "deprived of parental support or care by reason of the unemployment . . . of [the] father," section 407(a) of the Social Security Act, 42 U.S.C. § 607(a).[1] Matching funds are not provided to families made needy by reason of the unemployment of the mother. Section 403 of the Social Security Act, 42 U.S.C. § 603. Families who are eligible for AFDC-U may be provided medical assistance benefits under the federal-state Medicaid program whether or not they are actually receiving AFDC-U benefits, and participating states receive federal matching funds for the costs of such Medicaid benefits. Section 1902(a)(10) of the Social Security Act, 42 U.S.C. § 1396a(a)(10). Federal matching funds are not available for Medicaid payments on behalf of needy families deprived of parental support or care because of a mother's unemployment.

Massachusetts participates in the AFDC program and is one of 28 states (including the District of Columbia and Guam,[2] which has elected to participate in

[1] To be "unemployed" under § 407 and implementing federal regulations the father must satisfy the various federal criteria set out at note 57, *infra*. In addition, he must show that his family's countable income and resources are within the state's standard of need. See 45 C.F.R. § 233.20. In every case there must be an individualized determination of "unemployment" and "need."

[2] 42 Soc. Sec. Bull. 78 (1979).

the AFDC-U program.[3] Massachusetts also participates in the Medicaid program.[4] Accordingly, the federal government reimburses Massachusetts for 50% of its AFDC and Medicaid costs (A.13, 34).

Appellees Cindy and William Westcott reside in Springfield, Massachusetts with their infant son. Since 1972 Cindy Westcott has held various full-time and part-time jobs as a waitress, store clerk, tobacco picker and chambermaid. Her last position as a chambermaid, at which her weekly take-home pay was about $50, ended in November 1976. William Westcott has an 8th grade education. As of November 1976 his employment history consisted of intermittent work during 1976 at odd jobs such as unloading trucks and chopping trees and a two month position funded by the federal Comprehensive Education and Training Act (CETA), 29 U.S.C. 801 (A.38).

In November 1976 the Westcotts applied to the Massachusetts Dept. of Public Welfare for public assistance and were found ineligible because William Westcott did not have enough quarters of prior work to meet the federal-state AFDC-U definition of un-

[3] 6 CHSR III, sub. A, § 301.03; §§ 303.01, 303.04. (A.22-26); Mass. Gen. Laws Ann. ch. 19, § 10; ch. 118, § 1.

[4] In addition to providing Medicaid to families who receive AFDC and AFDC-U, the state has also opted to provide Medicaid to families who are eligible for AFDC and AFDC-U, but who have not applied for benefits. See 45 C.F.R. § 248.1(a)(1) and (c); Mass. Public Assistance Policy Manual, Ch. I, Section F, Subd. 2a.

employment (A.39).[5] Although Cindy Westcott did satisfy the requirement, her prior work history did not entitle the family to AFDC-U benefits because AFDC-U is available only to families in which the father satisfies the test of unemployment. Had the family been found eligible, it would have been entitled to $272.10 in benefits (A.15).

Appellees Susan and John Westwood reside in Plainfield, Massachusetts with their young son. Susan Westwood has worked to support herself and her family since 1972 as a part-time bookkeeper at a medical services facility. When this lawsuit was filed she was working ten to fifteen hours a week and earning a weekly takehome pay of $66. From January 1973 until the filing of this lawsuit, John Westwood's only employment consisted of intermittent logging and maple sugaring (A.39-40).

In February 1977 the Westwoods applied for Medicaid benefits as a family eligible for, but not receiving, AFDC-U benefits. They were found ineligible because John Westwood did not have enough quarters of work to satisfy the AFDC-U definition of unemployment (A.40).[6] Although Susan Westwood did satisfy the requirement because she was working less than 100 hours a month, see note 57, *infra*, her prior work history did not entitle the family to Medicaid

[5] The Westcotts were orally informed that they were ineligible for state funded general relief (A.39).

[6] The Westwoods' son received Medicaid as a needy individual under 21 (A.40).

benefits because of the limitation of such benefits to families in which the father meets the test of unemployment.

This lawsuit was filed in January 1977 on behalf of the Westcott family. In February 1977 the Westwood family was added as plaintiffs. The case was brought as a class action on behalf of those two-parent Massachusetts families with dependent children who would be eligible for AFDC-U and hence Medicaid benefits but for the gender limitation in § 407 and the implementing state regulations. The Secretary of HEW, who is charged with the federal administration of the AFDC and Medicaid programs, and the Commissioner of the Massachusetts Department of Public Welfare, who is charged with the state administration of AFDC and Medicaid, were named as defendants. The plaintiffs sought declaratory and injunctive relief, alleging that the gender classifications in § 407 and the state regulations which deny AFDC-U and Medicaid benefits to needy families in which the mother is unemployed violate their rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment.

After this lawsuit was filed, attorneys for plaintiff and the State defendant entered into stipulations whereby the State defendant would consider the Westcotts' and Westwoods' eligibility for AFDC-U and Medicaid respectively in light of Mrs. Westcott's and Mrs. Westwood's ability to satisfy the definition of unemployment except for the requirement that the

unemployment be that of the male parent. Both families were found eligible and awarded benefits pending resolution of their claims (A.28, 37, 39, 40).

On April 20, 1978 the District Court certified the class and on plaintiffs' motion for partial summary judgment on their federal constitutional claims and the federal defendant's cross motion for summary judgment held that section 407 and the state regulations discriminated solely on the basis of sex in violation of plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments respectively. The Court concluded that the gender classification was based on an "archaic and overbroad" generalization, similar to that invalidated by this Court in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), that mothers in two-parent families are not breadwinners so that the loss of their earnings would not substantially deprive their families (U.S.J.S. at 29a-30a). It also determined that the gender discrimination did not fairly serve the important legislative objectives of providing aid to needy families deprived of a breadwinner's support and promoting family stability (*Id.* at 23a, 26a-28a).

The court agreed with the parties that extension of benefits to the class rather than invalidation of the AFDC-U program was the appropriate remedy (*Id.* at 34a-37a). Accordingly, the court's April 20, 1978 order enjoined the state defendant from refusing to provide AFDC and Medicaid benefits to families deprived by the unemployment of a mother in the same

amounts and under the same standards as he provides such benefits to families deprived because of the father's unemployment. Moreover, operation or enforcement of § 407 was enjoined insofar as it prohibited approval of a state plan or payment of federal matching funds to Massachusetts for AFDC and Medicaid benefits on behalf of families deprived because of the mother's unemployment (*Id.* at 40a-42a).

By motion of June 7, 1978 the state defendant sought clarification or amendment of the District Court's April 20, 1978 order to permit it to impose a principal wage earner test which it had devised (State J.S. App. 6a-11a). Plaintiffs opposed the motion. HEW did not take a position on the state's motion in the district court. However, in response to the state's submission of a proposed amendment to its AFDC state plan to adopt a principal wage earner test, the HEW Regional Office advised the state on July 11, 1978 that such a test was not permissible (A.57-65).

During this time period William Westcott obtained his first full-time employment as a night watchman at the minimum wage. As a result, the State indicated that the Westcotts would not be eligible for further benefits if Massachusetts were able to apply its principal wage earner test since Cindy Westcott, still unemployed, would no longer meet the test for principal wage earner. The result would have been that William Westcott's disposable income after work expenses

would have been less than the amount of AFDC-U benefits the family was receiving.[7]

On August 9, 1978, the District Court denied the state's motion, noting that any restructuring of the AFDC-U program beyond the extension ordered on April 20, 1978 should be left to Congress (State J.S. App. 13a-14a).

This case is now before the Court in No. 78-437 on the direct appeal by the Secretary of HEW from the April 20, 1978 decision holding § 407 unconstitutional, and in No. 78-689 on the direct appeal by Massachusetts from the August 9, 1978 decision barring the imposition of a principal wage earner eligibility test.

SUMMARY OF THE ARGUMENT

The District Court held that the gender classification in section 407 of the Social Security Act, under which subsistence AFDC-U benefits are provided to two-parent families made needy by the father's unemployment but not to identically situated females made needy by the mother's unemployment, constituted impermissible discrimination on the basis of sex in violation of the due process clause of the Fifth Amendment. The court ordered that benefits be ex-

[7] Plaintiffs' Notice of Massachusetts' Planned Action to Terminate the Westcott's AFDC-U and Medicaid Because of Mr. Westcott's Employment . . ., July 28, 1978, pp. 3-4. The Westcotts were able to continue to receive partial AFDC-U benefits to supplement William's wages pursuant to the stipulation entered into by the plaintiffs and the State.

tended to families made needy when either parents, without regard to sex, became unemployed as defined by the Act and regulations. This decision is completely consistent with the prior decisions of this Court, the legislative history of the Act, and Congressional policies underlying the AFDC-U program, and should therefore be affirmed.

I

A

Section 407 of the Social Security Act discriminates against unemployed female wage earners by permitting a male wage earner to qualify himself and his family for AFDC-U and Medicaid benefits by showing he is unemployed and needy, while denying an identically situated female wage earner the same opportunity to qualify herself and her family for benefits. As this Court's decisions make clear, such denial of benefits to some and not to other two-parent families on the basis of the sex of the spouse claiming benefits is clear sex discrimination. See, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

Since section 407 is unquestionably gender-based and gender-biased, the standard against which the denial of benefits to unemployed female wage earners must be tested is that applied in prior gender discrimination cases and most recently reiterated in *Orr* v. *Orr*, No. 77-1119 (March 5, 1979), Slip. Op. p. 10: "[C]lassifications by gender must serve important

governmental objectives and must be substantially related to achievement of those objectives."

B

The objective of the AFDC-U program is to aid families deprived of support because of a breadwinner parent's unemployment. Prior to 1961, AFDC benefits were provided only to children made needy by reason of the absence, death, or incapacity of a parent. Congress recognized in 1961 that families could be equally needy when a parent became unemployed, and therefore adopted section 407 to provide aid on a gender neutral basis to families deprived because of the unemployment of a parent. When Congress made the AFDC-U program under section 407 permanent in 1967 it confirmed its objective of meeting children's needs caused by unemployment, but imposed a federal definition of employment to make implementation more uniform throughout the country.

In both 1961 and 1967 Congress had generally discussed the role of parents as providers in sex stereotypical terms, with the father as breadwinner and the mother as a non-breadwinner homemaker. While the legislative history is far from clear, it appears most likely that Congress adopted the gender distinction in section 407 in 1967 on the basis of this stereotype since Congress had determined to assure only past breadwinners should be able to qualify for aid on the basis of their unemployment.

What is clear, however, is that neither section 407 nor its gender classification were adopted, as the Solicitor General argues, to serve a Congressional objective of reducing father desertion among poor families. While Congressional and Administration proponents of an expanded AFDC program sometimes claimed that such expansion would have the desirable incidental effect of reducing desertion incentives, the legislative history shows that Congress adhered to meeting the needs of the children of the unemployed as the objective of section 407. Indeed, the Solicitor General's argument finds no support in the Act, committee reports, or statements of bill managers or sponsors, and relies almost entirely, particularly in 1967, on the words of the bill's opponents. Moreover, the Solicitor ignores the adoption of two provisions related specifically to addressing the problem of desertion, both of which were sex-neutral.

C

The gender classification in section 407 is a constitutionally impermissible way to serve the objective of aiding two-parent families in need because of unemployment. In failing to protect needy families against the unemployment of a wage earner mother, Congress acted on the "archaic and overbroad" generalization, that fathers but not mothers contribute vitally to their families' support, which this Court condemned as unconstitutional in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The gender classification in section

407, denigrates the efforts of women who do work to support their families, and is irrelevant to a determination of whether there has been a deprivation of *parental* support caused by unemployment. Indeed, the Solicitor General virtually concedes that the gender classification in section 407 must fall if it rests on Congressional assumptions that women are not wage earners, and it most assuredly does.

Classifications based on stereotypes about gender roles are invidious not because statistics do not back up the stereotype, for often they do, but because they penalize individual men and women whose behavior does not fit the stereotypical mold. Current statistics demonstrate that married women with children are participating significantly in the labor force and that their earnings are vital to their families. There is no valid basis for denying AFDC-U benefits to these mothers as a class when they become unemployed.

D

The Solicitor General argues, however, that Congress adopted the gender classification because its objective with respect to section 407 in 1967, indeed its only objective, was to correct a structural flaw in the AFDC program under which a parent could qualify a family for AFDC benefits by deserting. In addition, Congress addressed only desertion by fathers, since fathers deserted more frequently than mothers.

This argument fails for two reasons. First, even if Congress did have an objective for section 407 related

to desertion, which we dispute, surely that objective was to keep both parents, not just the father, at home. Surely the gender classification does not serve that sex-neutral objective, and the Solicitor General does not argue otherwise.

Second, even if the Congressional objective were to eliminate the alleged incentive for *fathers* to desert, such a gender-based purpose, as this Court recently recognized in *Orr* v. *Orr, supra*, cannot sustain the statute. The decision not to aid unemployed mothers since they are less likely deserters is based on overbroad generalizations that unemployed mothers, "the center of home and family life," will remain with their families during bad times while unemployed fathers will flee unless they are financially rewarded. By denying unemployed mothers the financial support that is provided to men to enable them to remain at home, Congress has denied mothers the equal protection of the law secured by the Fifth Amendment.

II

A

The District Court correctly ordered that AFDC-U benefits be extended to families in which the unemployed mother satisfies all of the conditions of section 407. The Solicitor General agrees that extension is the appropriate remedy if the gender classification is found unconstitutional.

Extension is consistent with the Social Security Act's separability clause, 42 U.S.C. § 1303, and with

this Court's decisions uniformly extending Social Security Act benefits when a provision of the Act has been found unconstitutional. See, *e.g., Califano* v. *Goldfarb,* 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld, supra.* Invalidation would cause irreparable harm to over half a million individuals, mostly chidren, currently receiving AFDC-U. Extension would protect these children and allow Congress to make any necessary adjustments in the program. Moreover, since AFDC-U is optional with the states, any state unsatisfied with the additional coverage resulting from extension could drop out of the program.

Extension is also consistent with the history, purposes, and structure of AFDC-U. With the exception of the 1967 change in section 407, the AFDC program has been gender neutral since 1935. Extension would remove this one exception. Contrary to Appellant Sharp's arguments, extension would not represent a fundamental shift to a guaranteed income to the working poor, for a parent would still have to satisfy all the AFDC-U eligibility requirements including the complex federal definition of unemployment.

The extra cost of extension surely does not show that Congress would prefer invalidation of the AFDC-U program. Even if the cost estimates proferred for purposes of this lawsuit are accepted, and there is good reason to doubt them, the increase would be only a percentage or two above current AFDC expenditures. In any event, as Appellant Sharp noted

below, Congress did not add the gender classification in 1967 for cost reasons.

B

Appellant Sharp's argument that this Court should avoid the choice of extension or invalidation, and should instead restructure the program by adopting a "principal wage earner model," must be rejected.

A principal wage earner test is inconsistent with the language, structure and history of the Act. The effect of such a test would be to deny aid to 29% of those currently eligible, a result contrary to 42 U.S.C. § 1303 which preserves benefits to eligible recipients when a provision of the Act as applied to others is invalidated, to 42 U.S.C. § 1304, which reserves to Congress the power to alter or amend the Act, and to 42 U.S.C. § 602(a)(10), which guarantees benefits to all who fit within the federal statutory standards. Moreover, a principal wage earner test has never been used by Congress to determine AFDC eligibility under section 406(a) or AFDC-U eligibility under section 407. In addition, as the Solicitor General points out, Massachusetts could not implement a principal wage earner test under controlling federal regulations now in effect.

These arguments are confirmed, not refuted, by the 1961 legislative history of section 407 on which Appellant Sharp relies. That history does not show that Congress wanted to exclude two-worker families, but

only that Congress was largely unaware of women's role as family supporters. There is no indication that in 1967 the gender classification was added to impose a principal wage earner test.

A principal wage earner test must also be rejected because this Court lacks the authority under Article III and the competence to resolve the many important policy issues involved in a principal wage earner test. These include the appropriate definition of a principal wage earner, the treatment of currently eligible families who would otherwise be terminated, and the political question of whether such a test should be adopted since it would fall most heavily on women workers who have long suffered economic discrimination. Resolution of these issues is appropriately left to Congress.

I

SECTION 407 DISCRIMINATES AGAINST UNEMPLOYED FEMALE WAGE EARNERS IN VIOLATION OF THE FIFTH AMENDMENT

A. Section 407 Discriminates Against Female Wage Earners By Denying Them and Their Families Financial and Medical Assistance Desperately Needed During Their Unemployment; The Heightened Scrutiny Applied in Prior Gender Discrimination Cases is Therefore Appropriate.

There is no dispute that section 407 entails a gender classification. (U.S. Brief in No. 78-437 at 36) (herein-

after U.S. Brief). Under the statute a father can qualify himself, his spouse and his dependent children for AFDC-U and medical benefits to sustain them during the crisis of his unemployment by showing that he is both unemployed within the federal definition, and needy. A mother who becomes unemployed cannot qualify herself, her spouse or her children for the same benefits because she is absolutely denied the opportunity of showing that she is unemployed and needy.

The message to the unemployed woman is clear: the government regards as worthless her work efforts to raise her family out of poverty. It denies that her unemployment is as much of a calamity for her family, which has depended upon her earnings to buy the groceries and pay the rent, as is the unemployment of a father. Rather, at the moment of crisis, the government intervenes through section 407 only on behalf of needy unemployed fathers to replace the income lost by their unemployment, but it ignores the identical plight of a needy unemployed mother.[8]

[8] For the unemployed women who have most likely had unskilled and low paying jobs, the denial of AFDC-U when they lose their jobs is only a "heaping on" of the economic disadvantages long endured by all women, but in particular by poor women. *Frontiero* v. *Richardson*, 411 U.S. 677, 689 n. 22 (1973). Thus, women generally have lower incomes than men because they are more likely to hold dead end jobs. They are plagued by a higher unemployment rate than men and sex discrimination inhibits them from taking full advantage of job market opportunities. As a result, women are more likely to be poor than men. "Women With Low Incomes," U.S. Dept. of Labor, Employment Standards Adm., Women's Bureau, 1-3 (November, 1977).

Even though the Solicitor acknowledges that § 407 contains a gender classification, he claims that this classification does not operate "at the needless expense of women," U.S. Brief at 36, because there is a father and a mother present in every family which receives, or which is denied, AFDC-U benefits. This Court has uniformly struck down gender classifications that result in benefits being granted or denied to families on the basis of the sex of the qualifying parent, however.

In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), for example, some families received an added quarters allowance, while others did not. Both types of families consisted of husbands and wives, but the disqualified families were always the families in which the wife was the spouse in the military service. This Court did not even stop to consider whether or not this was discriminatory; the only issue was whether the discrimination was constitutionally justifiable. Similarly, this Court has summarily affirmed a holding that the distribution of Social Security benefits to husband-wife families in different amounts, based solely on the sex of the spouse's earnings record which was qualifying the family, was unconstitutional. *Califano* v. *Jablon*, 430 U.S. 924 (1975), *summarily affirming* 399 F. Supp. 118 (D. Md. 1975).[9]

[9] The District Court had observed: "The Government has at no time during the course of this litigation denied that [the sections at issue] discriminate between male and female spouses of covered wage earners on the basis of sex and on that basis alone." *Jablon* v. *Secretary of HEW*, 399 F. Supp. 118, 125 (D. Md. 1975).

Even in cases in which only one spouse has survived, the Court has focused upon the impact on the family. Thus, in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 651 (1975), the Court struck down a classification which discriminated among surviving children on the basis of the sex of the parent who would be available to stay home with the children. In *Califano* v. *Goldfarb*, 430 U.S. 199, 209 (1977), the Court found that discrimination against "one particular category of family" on the basis of the sex of the spouse with Social Security coverage is impermissible.

The Solicitor General also argues that gender discrimination does not exist here because AFDC-U is a public assistance program. The distribution of social security benefits or fringe benefits solely on the basis of sex of the qualifying spouse favors one spouse over another, he says, but the distribution of subsistence benefits on the basis of the sex of the qualifying spouse does not. (U.S. Brief, p. 39).

There is no basis for concluding that sex discrimination is present in the case of Social Security benefits or fringe benefits but not AFDC-U benefits, however. The mothers being denied subsistence AFDC-U benefits for their families have worked in the past just as much as the men who qualify. Moreover, the benefits being denied are not simply employment related fringe benefits (as in *Frontiero* v. *Richardson*, *supra*) or non-need based Social Security benefits (as in *Weinberger* v. *Wiesenfeld*, *supra*), but public assistance benefits available as a last resort for parents hit by

unemployment and otherwise unable to provide basic necessities for their children and themselves. Cf. *Nyquist* v. *Mauclet*, 432 U.S. 1, 13, (1977) (Burger, C.J. dissenting) (distinguishing the denial of higher education benefits to certain aliens from the ". . . denial of *welfare* benefits essential to sustain life. . . .") (emphasis in original).[10] Surely there could be no greater "denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support," *Weinberger* v. *Wiesenfeld, supra*, at 645, than to deny subsistence benefits based on past work efforts at the moment of crisis.

The harm caused to these women and their families by denial of subsistence benefits, not just fringe benefits or non-need based Social Security benefits, is compounded by two further considerations. First, more people in a family are adversely affected. It is not just the woman herself, as in *Reed* v. *Reed*, 404 U.S. 71

[10] Indeed, this Court has held that the statutory entitlement under a public assistance program creates such a great personal interest that the most rigorous due process standards are applied, while the procedural requirements under aspects of the Social Security program or federal employment may be less rigorous. Compare *Mathews* v. *Eldridge*, 424 U.S. 319, 340 (1976) (Social Security disability benefits) and *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (federal employment) with *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970) ("Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental largesse is ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.")

(1971), not just she and her spouse, as in *Frontiero* v. *Richardson, supra*, but the entire family including children which suffers from the denial of AFDC-U, making this case most akin to *Weinberger* v. *Wiesenfeld, supra*. Second, section 407 flatly denies all women the opportunity to qualify their families for AFDC-U, in contrast to gender classifications which only imposed proof of dependency requirements on the spouse of a female wage earner. *Frontiero* v. *Richardson, supra; Califano* v. *Goldfarb, supra*, 430 U.S. at 224 (1977) (Rehnquist, J. dissenting and distinguishing *Weinberger* v. *Wiesenfeld, supra*).

The Solicitor's argument that the classification here is not gender-biased is finally put to rest by the Solicitor's colleagues. A Department of Justice task force considering this matter in a non-adversarial context has now advised the President that section 407 "*overtly and substantively discriminate[s] against women.*" Task Force on Sex Discrimination, Civil Rights Division, U.S. Dept. of Justice, Interim Report to the President, 155 (October 3, 1978) (emphasis supplied). Surely this is correct.[11]

Since section 407 so clearly "provides that different treatment be accorded . . . on the basis of . . . sex; it

[11] Moreover, the two other District Courts which have rendered opinions on this issue have concluded that § 407 discriminates on the basis of gender. See *Stevens* v. *Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), appeal docketed *Califano* v. *Stevens*, No. 78-449 (U.S. Supreme Court); *Browne* v. *Califano*, Civ. Act. No. 77-1249 (E.D. Pa. June 9, 1978), appeal docketed *Califano* v. *Browne*, No. 78-603 (U.S. Supreme Court).

thus establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed* v. *Reed, supra*, 404 U.S. at 75.[12] Accordingly, the constitutionality of denying AFDC-U to unemployed wage earners and their families while providing benefits to unemployed male wage earners and their families must be determined by applying the heightened scrutiny that this Court has invoked in prior gender classification cases. See, *e.g.*, *Orr* v. *Orr*, No. 77-1119 (March 5, 1979); *Weinberger* v. *Wiesenfeld, supra*, *Califano* v. *Goldfarb, supra*, and *Craig* v. *Boren*, 429 U.S. 190 (1977).[13]

The heightened test which the Court has approved in recent gender classification cases is that "'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Orr* v. *Orr, supra*,

[12] "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld, supra*, 420 U.S. at 639, n. 2.

[13] Compare *Wiesenfeld* and *Goldfarb* with *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976) ("because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.") (citations omitted); *Mathews* v. *DeCastro*, 415 U.S. 957 (1976); and *Califano* v. *Jobst*, 434 U.S. 47 (1977). The different outcomes in the gender classification cases, *Wiesenfeld* and *Goldfarb*, on the one hand, and the cases involving other bases of classification, on the other hand, demonstrates the significance of the elevated review standard applied to sex-based classifications.

slip op. at 10, quoting *Califano* v. *Webster*, 430 U.S. 313, 316-17 (1977) (per curiam). One distinction between the traditional test and the more rigorous test applied in gender discrimination cases is the Court's attempt to discern the actual Congressional objectives for the legislation. We turn therefore to the legislative history.

B. The Legislative History of Section 407 Demonstrates That Congress' Fundamental Objective Was to Aid Needy Families Deprived Because Of A Breadwinner's Unemployment.

The AFDC program was enacted during the Great Depression to provide financial assistance to needy children who did not have a breadwinner in the home to benefit from the work programs then being launched. H. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935). The categories of needy children who were covered were therefore defined by section 406 of the Social Security Act as those "deprived of parental support or care" because of the "death, absence, or incapacity" of a parent. 49 Stat. 629 (1935). See generally *King* v. *Smith*, 392 U.S. 309, 327-30 (1968).

It is plain that Congress generally associated a family's deprivation of a breadwinner's support with the *father's* absence, death, or incapacity, and that it anticipated that the beneficiaries would therefore be "principally families with female heads." S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935); H. Rep. No. 615, *supra*, at 10. See *King* v. *Smith, supra*, 392 U.S. at

328-29. Adhering to a principle of sex-neutrality that continued until adoption of the gender classification at issue herein, however, Congress used the gender-neutral term "parent" in the legislation itself.

The class of children aided under the AFDC program remained limited to those with an absent, dead, or incapacitated parent until 1961, when the AFDC program was expanded to include the children of unemployed parents. Pub. L. 87-31, 75 Stat. 75 (1961). A review of the legislative history from 1961 onward shows that Congress enacted and extended the AFDC-U program for the purpose of meeting the subsistence needs of the children of unemployed workers, that Congress generally applied sex stereotypes in addressing the problem of unemployment, and that various incidental effects of the legislation, including a possible effect on the rate of desertion, were discussed from time to time but never became a purpose of the legislation.

1. The Congressional Objective of the AFDC-U Program was to Meet the Needs of Children Caused by the Unemployment of a Parent.

The Administration offered legislation expanding the AFDC program in 1961 in order to meet the needs caused by a parent's unemployment which, "in logic and humanity," as President Kennedy said, were just as great and worthy of being met as the needs of children with an absent, dead, or incapacitated parent.[14] HEW Secretary Ribicoff emphasized this point in testimony before the House Ways and Means Committee:

> "[T]here is no justification whatsoever for denying to the child of the unemployed parent the food that you give to the child of the parent who deserts or is absent or dead." H. Rep. Hearings on H.R. 10606, 87th Cong., 1st Sess. 102 (1961) (hereinafter 1961 House Hearings).

Both the House and Senate committee reports in 1961 explicitly described the purpose of the proposed legislation as meeting needs occasioned by a breadwinner's unemployment.[15] Floor debate in both House

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[14] Message of President Kennedy, H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961) (hereinafter 1961 House Report). President Kennedy spoke in stereotypical terms, describing the sex-neutral AFDC program as one to provide aid to children deprived by the death, absence, or incapacity of a father, and describing his proposed sex-neutral AFDC-U program as one to provide for children with unemployed fathers. *Id.* Nonetheless the bill proposed by his Administration, H.R. 3865, 87th Cong. 1st Sess., defined a dependent child as one deprived because "of the unemployment of a parent." See, H.Rep. Hearings on H.R. 10606, 87th Cong., 1st Sess., 1, 5, 11 (1961). The Solicitor General incorrectly suggests that the definition adopted by Congress was broader than the Administration's recommendation to provide only for families with unemployed fathers. U.S. Brief, p. 16.

[15] 1961 House Report, *supra*, at 1-3 (1961); S. Rep. No. 165, 87th Cong., 1st Sess. 1, 2-3 (1961), reprinted in [1961] U.S. Code Cong. and Ad. News 1716, 1717. For example, in the section entitled "Need for the Legislation," the House Report stated that the Committee had developed a bill "to permit States to assist children who are in need because of the unemployment of a parent" in response to the recommendation of the President that this step be taken "[a]s a part of a broader program to combat the current recession and to relieve resulting hardships. . . ." 1961 House Report, *supra*, at 2.

and Senate also emphasized Congress' intent to aid families deprived because of a breadwinner's unemployment. Rep. Mills, Chairman of the Committee on Ways and Means, made this point most clearly:

> "I think a child can be just as much in need because of a parent's not being able to find a job as it can because of the physical condition of a parent that prevents him from working." 107 Cong. Rec. 3761 (1961).

Somewhat later in the debates he again stressed that the legislation is "thinking here solely in terms of the welfare of this child that is needy because the parent is unemployed." 107 Cong. Rec. 3764 (1961).[16] The language of the bill which passed Congress reflected this clear intent, for it allowed states to define a dependent child as one "deprived of parental support or

[16] Rep. Byrnes, the second ranking minority member of Ways and Means, agreed: "What the legislation does is to add the new category which says that if the breadwinner is able to work and if he is involuntarily unemployed and no work is available, we will treat that family in the same manner we treat the family when the breadwinner is dead, absent, or incapacitated." 107 Cong. Rec. 3767 (1961). Rep. Ullman, then a junior member of Ways and Means, described the "main purpose" of the bill as "the mitigation of the needs of the unemployed." 107 Cong. Rec. 3770 (1961). Rep. Joelson stated that "pangs of hunger are no less real to the children of the unemployed who are without resources than they are to the children of the ill or absent father." 107 Cong. Rec. 3769 (1961). Rep. Doyle noted that "this bill is designed primarily and exclusively to help meet the needs of needy children where there is clearly existing involuntary unemployment on the part of the parents . . ." 107 Cong. Rec. 3763 (1961).

care by reason of the unemployment of a parent." § 407 of the Social Security Act, Pub. L. No. 87-31, 75 Stat. 75 (1961).

In 1962, Congress extended the AFDC-U program for another five years. Pub. L. 87-543, 76 Stat. 193. In renewing and increasing its commitment to families with an unemployed parent, Congress reiterated its views that a family with an unemployed parent was just as needy as the family deprived because of a parent's absence, death, or incapacity. H.R. Rep. No. 1414, 87th Cong., 2nd Sess. at 8-9, 15 (1962); S. Rep. No. 1589, 87th Cong., 2nd Sess., at 11 (1962), 108 Cong. Rec. 4268 (1962) (Rep. Mills).

Congress took action twice in 1967, the second time imposing the gender restriction at issue herein. If there were any question as to whether there was a Congressional commitment to meeting the needs of children of unemployed workers, it was answered early in the year when a further extension of the temporary authorization for section 407 was required. At that time Senator Ribicoff, recognized as the leading Senate authority on public assistance law, stressed the humanitarian purpose of the legislation:

> "I told the Congress in 1962, and I say to you again, that a child can be just as hungry if a parent is unemployed as if a parent is dead, absent or incapacitated." 113 Cong. Rec. 17498 (1967).

Senator Kuchel also urged extension of this "program of the gravest importance to the welfare of my State

of California," noting that "the ultimate disaster" will be complete termination of the program "under which 100,000 children in my State alone will be adversely affected." *Id.* A one-year extension was accepted without opposition, Pub. L. 90-364, 81 Stat. 94 (1967).

The committee reports and key floor statements later in the session during discussions of legislation to make the AFDC-U program permanent therefore concentrated on the need for specific improvements in the program. In particular, Congress sought to develop a federal definition of current unemployment to assure that the needs that were being met were created by unemployment as Congress understood it, and to require that a person claiming to be unemployed had a significant prior attachment to the workforce. H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (hereinafter 1967 House Report), see *Batterton* v. *Francis*, 432 U.S. 416 (1977).[17] The only disputes were over the breadth of the AFDC-U program, such as the debate over the Senate amendment dropped in Conference which would have made the program man-

[17] The 1967 House Report characterized the AFDC-U proposal as one resulting in "improvements" (p. 107) and a more "definitive program of aid to the children of the unemployed." (p. 97). See also S. Rep. No. 744, 90th Cong., 1st Sess., 3-4, 159-160; 113 Cong. Rec. 23054 (Mills); 113 Cong. Rec. 32852 (Ribicoff). Witnesses before the House and Senate Committees continued to speak of the critical needs of families suffering from unemployment. See, *e.g.*, House Hearings on H.R. 5710, 90th Cong., 1st Sess., 838, 1705, 1820 (1967) (hereinafter 1967 House Hearings); Senate Hearings on H.R. 12080, 90th Cong., 1st Sess., 781, 1335, 1613, 1643 (1967) (hereinafter 1967 Senate Hearings).

datory on the states. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57 (1967) (hereinafter 1967 Conference Report). There was no attempt to oppose the AFDC-U program itself as there had been in 1961, see Point I.B.2. *infra*, or to suggest that the objective of the legislation had changed.

In sum, Congress had decided that the needs of the children of the unemployed continued to be a matter of federal concern, that the AFDC-U program was a good one that only needed some greater specificity but did not need fundamental reappraisal by Congress, and that there was no longer any need to set an expiration date for the program to assure later Congressional review. Congress clearly confirmed its commitment to meeting the needs of the unemployed, retaining the 1961 statutory structure, and the definition of a dependent child as one "deprived of parental support or care by reason of . . . unemployment, . . ." Section 407(a), 42 U.S.C. § 607(a).

2. Congress Enacted the Gender Classification in Section 407 On the Basis of Sexual Stereotypes about the Wage Earning Roles of Men and Women.

Although in 1935 and 1961 Congress frequently discussed the AFDC and AFDC-U programs by referring to the stereotypes of families deprived of a male breadwinner's support,[18] it legislated in a gender

[18] See *e.g.*, *King* v. *Smith*, *supra*, 392 U.S. at 328; 107 Cong. Rec. 3761, 3768, and 6402 (1961); *Cf.* 1961 House Hearings, *supra*, at 5, 95-99, 101, 104, 326, 338, 339, 341, etc.

neutral way to provide aid to families deprived because of a parent's absence, death, incapacity, or unemployment. 49 Stat. 629 (1935); Pub. L. 87-31, 75 Stat. 75 (1961). It was only in 1967 that Congress abandoned its 32 year tradition of a gender neutral AFDC program and adopted an AFDC-U program limited to children "deprived of parental support . . . by reason of the unemployment . . . of the father." Pub. L 90-248, § 203, 81 Stat. 882 (Jan. 2, 1968). As we shall show, the legislative history demonstrates that the change from parent to father was not an "actual, considered legislative choice," *Califano* v. *Goldfarb, supra*, 430 U.S. at 223, n. 9, (Stevens, J. concurring); instead Congress simply succumbed to the traditional thinking that in two-parent families the father is the only breadwinner with significant earnings.

The adoption of the gender classification was hardly a major issue before Congress in 1967, since unlike the 1961 legislation which dealt only with the AFDC-U program, the Social Security Amendments of 1967, P.L. 90-248, 81 Stat. 821 (Jan. 2, 1968), addressed a host of issues in the OASDI, Medicare, Medicaid, and other child health and welfare programs, as well as in the AFDC program. The record of the hearings before the House Ways and Means Committee indicates a consistent pattern of stereotyping fathers as breadwinners, for witness after witness described the existing program as one for unemployed fathers rather than unemployed parents, never noting the inconsistency. 1967 House Hearings, *supra*, at 838, 1705, 1820, 1836, 1927, 2056, 2366.[19] The bill reported to the House floor, H.R. 12080, contained the gender classification, and the accompanying Report merely noted that "some states make families in which the father is working but the mother is unemployed eligible" but that the law would be changed so that "the program could apply only to the children of unemployed fathers." 1967 House Report, *supra*, at 108. No explanation was given as to why Congress objected to eligibility on the basis of the mother's unemployment when the father was employed, but not to eligibility when the father was unemployed and the mother was employed.[20] The Report did note that states vary widely in their definitions of unemployment, some going "beyond anything Congress originally envisioned." *Id.* See *Philbrook* v. *Glodgett, supra*, 421 U.S. at 707, 711 n. 6. This meant that some states were requiring very little prior attachment to the workforce, allowing non-wage earner spouses to

[19] The Administration's bill which was the subject of the House Committee Hearings would have preserved the gender neutral language in § 407. See § 208(d) of H.R. 5710, set out at 1967 House Hearings *supra*, at 65.

[20] This Court has already noted the weaknesses of the 1967 legislative history on § 407. *Philbrook* v. *Glodgett*, 421 U.S. 707, 717, (1975) (legislative history ambiguous and appears to refer to the wrong subsection); *Batterton* v. *Francis*, 432 U.S. 416, 430, (1977) (legislative history is at variance with the Act). This is of course, the legislative history which was of so little aid to this Court in *Rosado* v. *Wyman*, 397 U.S. 397, 412 (1970), but of some help in *Quern* v. *Mandley*, 436 U.S. 725 (1978) and *Youakim* v. *Miller*, No. 77-742, 47 U.S.L.W. 4185 (1979).

qualify the family for benefits.[21] The gender classification may well have been seen as one means of addressing this perceived shortcoming in the program. Thus Congress, with an image of the traditional family, might well have viewed "unemployed" mothers as homemakers and child rearers rather than involuntarily unemployed wage earners, and concluded that it did not want to aid families unless "the real breadwinner," assumed to be the father, were unemployed.[22] The gender classification in § 407 passed the House without any member focusing on the change from "parent" to "father."

The Senate subsequently held hearings on H.R. 12080, the House-passed bill. Although witnesses therefore had the opportunity to address the newly adopted denial of aid to unemployed mothers, the 2000 pages of hearing testimony indicate that not one

[21] The District Court in *Stevens* v. *Califano*, 448 F. Supp. 1313, 1323, n. 11 (N.D. Ohio 1978) concluded that Congress intended to provide aid when both parents were unemployed. If so, Congress certainly proceeded in a most arbitrary and ineffective manner.

[22] In an uninformative exchange in 1961, Rep. Mills, floor manager of the bill, had reflected the stereotypical view of a mother's role as earner when he answered a question as to whether aid would be provided "if either the father or mother is unemployed" 107 Cong. Rec. 3765 (1961), by saying that the father usually has the responsibility for supporting the family and then by using an example of a mother earning a dollar a day. *Id.*

witness commented on the gender classification.[23] Instead the transcript is replete with interchangeable references to the unemployed parents and unemployed fathers program, to incorrect descriptions of the existing program as the unemployed *fathers* program, and to incorrect references to the unemployed *parents* provision in H.R. 12080.[24] Even HEW Under Secretary Cohen, whose agency's bill was gender-neutral, spoke of the H.R. 12080 "unemployed parents" program, 1967 Senate Hearings, *supra*, at 268-69. See also 717, 736. In all, the Senate Hearing Record reveals the deep-rooted nature of the perception that in two-parent families only fathers are breadwinners whose unemployment deprives the family of support.[25]

[23] Buried in the written statements are two perfunctory objections to the gender classification by the Pennsylvania Department of Public Welfare and the United Automobile Workers. Senate Hearings on H.R. 12080, 90th Cong., 1st Sess., 1686, A254. (hereinafter 1967 Senate Hearings). In addition, there is one uninformative exchange in which Senator Long, Chairman of the Committee, seems simply to note that the change has been made, but neither he nor the witness see that as being of any significance, 1967 Senate Hearings, *supra*, at 935-37.

[24] See 1967 Senate Hearings *supra*, at 781, 946; 1149-51; 1295; 1305; 1335; 1523; 1538; 1613; 1634; 1917; 1941; 1995; A184; A261; A252; A286.

[25] During the Senate Hearings, for example, Sen. Robert Kennedy spoke of the need for the father to be the "head of the family" and of the need for jobs so that "men could go to work and their wives would not have to go on welfare." 1967 Senate Hearings, *supra*, at 788. Indeed, one witness described the effect of the mother as wage earner in a two-parent family as follows: "Males leave because they cannot stand the idea of sitting around while their wives bring in the money." *Id.* at 2021.

H.R. 12080 as reported by the Senate Finance Committee retained the gender classification in § 407, and the Committee Report adopted, verbatim, the uninformative language of the House Report on the limitation to unemployed fathers. S. Rep. No. 744, 90th Cong., 1st Sess., 160 (hereinafter 1967 Senate Report). This Report does suggest a Committee mindset which focused on the traditional family with the father as provider and the mother as homemaker, explaining that the AFDC-U prior attachment to the work test had been dropped from the House bill because ". . . no one needs the advantages of work and training programs more than the man who has a wife and children but has no significant history of employment." *Id.*

The gender classification in section 407 was not discussed at all during the subsequent Senate floor debates on H.R. 12080, although an auspicious opportunity arose when the Senate accepted an amendment creating a sex-neutral general assistance program for the District of Columbia entitled "Assistance to Families of Unemployed Parents." 113 Cong. Rec. 33191; P.L. 90-248, § 204(a), 81 Stat. 889, 42 U.S.C. § 644. Senator Long, floor manager of the bill, spoke interchangeably of "unemployed parents" and "unemployed fathers" when talking about AFDC-U. 113 Cong. Rec. 33193 (1967). The debates on other sections suggest that the Senators addressing the legislation simply believed that in two-parent families women stay home, and that the only matter for debate

was whether a mother in a one-parent home should be required to work.[26]

Given these attitudes, it is not surprising that virtually no attention was given to the gender classification in section 407, the reason for the classification, or its likely effect.[27] The only reasonable conclusion concerning the section 407 gender classification that the legislative history supports is that Congress was legislating under the assumption that in two-parent families men are the only family providers that count, and that it simply did not occur to Congress that women in two-parent families could be wage earners whose unemployment deprived the family.

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[26] "I believe that we should move in the opposite direction and encourage the mother to remain at home with the children." 113 Cong. Rec. 33541 (1967) (Robert Kennedy). "The mother of three or four or five children [is] needed to assure at least some parental supervision as well as doing the cleaning, the sewing, the preparations in the home that make it possible for those children to enjoy their home life. It goes without saying and we can take judicial notice of the fact, that a mother with children who has to go outside the home and work every day is not able to give those children a precious heritage we ought to try to provide for all American boys and girls, a happy home life." 113 Cong. Rec. 33612 (1967) (Morse). "Some of the best mothers in America, and the most responsible ones, hold their families together when the fathers are not available to support them—in the event of death or some unforseen tragedy." 113 Cong. Rec. 33543 (1967) (Long.)

[27] During the Senate Floor debate on the Conference Report Senator Muskie merely noted and opposed the gender limitation in § 407. 113 Cong. Rec. 36914 (1967).

3. Congressional Concerns About Many Possible Effects of the Legislation, including its Possible Effect on Desertion, Were Incidental to the Objective of Meeting the Needs of the Children of Unemployed Parents.

The entire thrust of the Solicitor General's argument is that the reduction of the "incentive for unemployed fathers to desert their families" was a principal purpose of the 1961 Act, U.S. Brief, p. 13, and that the 1967 amendments changed section 407 so that its sole "function . . . was to eliminate the incentive for unemployed fathers to desert." U.S. Brief, p. 23. A review of the pertinent history shows that neither claim is correct.

As in the case of all major legislation, proponents and opponents of the legislation described a variety of effects which the legislation would have on the program at issue and on society at large, and the debates over these effects must be considered for a full appreciation of the reasons for the final bill.

The major possible effect of the 1961 Act which was debated by the bill's proponents and opponents was the increase in the federal role in public assistance. Some in Congress made it clear that they hoped that the AFDC-U program would be just one step toward a more comprehensive federal welfare program

for the poor.[28] Others opposed the bill because of a fundamental aversion to any expanded effort of this nature[29] or because they believed the states should retain responsibility for meeting the needs of two-parent families.[30] The AFDC-U program did become permanent, however, thereby achieving the effect which many of its original proponents had hoped for.

A second effect desired by some proponents of the bill was fiscal relief for units of state and local governments hard-pressed by the recession.[31] Once the

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[28] Rep. Ullman noted that the Congressionally-established Advisory Council on Public Assistance had recently urged coverage for all needy children, and that "this bill would largely carry out" that recommendation. 107 Cong. Rec. 3771 (1961). Sen. McCarthy specifically expressed the hope that this temporary measure would prompt Congress to decide to provide federal funding for state general assistance programs. 107 Cong. Rec. 6401 (1961).

[29] "The welfare state holds nothing but woe and degeneration for us. . . . [W]e cannot long continue this course without complete disaster." 107 Cong. Rec. 6402 (1961) (Sen. Thurmond). Rep. McFall argued that the program would impair the harvesting of crops since agricultural workers "would be supported in idleness." 107 Cong. Rec. 3758 (1961). Rep. Mason argued that such temporary emergency programs always become permanent. 107 Cong. Rec. 3764 (1961).

[30] Separate dissenting views of Reps. Curtis and Alger, 1961 House Report, *supra*, at 12-14.

[31] The original bill submitted by the Administration specifically barred substitution of federal funds for state and local funds, H.R. 3865, 87th Cong., 1st Sess., see 1961 House Hearings, *supra*, at 5. This provision was deleted from the bill reported to the floor, although the Committee Report indicated that the Committee still intended that there be no substitution. 1961 House Report, *supra*, at 3. Rep. Machrowicz, a member of the Committee, made it crystal clear during floor debate that the

bill was adopted, some states moved quickly to take advantage of the federal funds offered. The impact on the state fisc was dramatic proof of the achievement of the fiscal relief effect of the bill: states that participated in the AFDC-U program experienced a decrease in their general assistance rolls, while the general assistance rolls increased in other states.[32] Almost half of the persons receiving AFDC-U had been transferred from general assistance.[33] Thus the second major incidental effect of the bill was achieved.

There were also a series of effects on family life which many hoped would be achieved by passage of the bill. One speaker hoped that more children would

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Committee's action meant that non-substitution was "not a legislative requirement," and that states would not be required to have "separate appropriations or separate accounting." 107 Cong. Rec. 3770 (1961). Rep. Mills agreed that "there is no way for us actually to guarantee that the money itself will go to the recipients to the full extent we wish." 107 Cong. Rec. 3765 (1961).

[32] Eleven of the twelve states that entered into the AFDC-U program reduced their general assistance rolls by 171,168 recipients, or 38%, while the other states held even. The drop in some states was particularly sharp. Pennsylvania went from 106,567 recipients in December 1960 to 43,471 in December 1961, New York from 123,787 to 75,815, and Illinois, from 140,038 to 111,558. (Data on December 1960 recipient count obtained by telephone from Office of Research and Statistics, Social Security Administration, HEW, March 1979; data on December 1961 recipient count obtained from 6 Welfare in Review 46 (1968); Oklahoma data not available; the 12 states which adopted AFDC-U in 1961 are listed in the Brief for the United States, p. 30, n. 19).

[33] Hearings before Senate Finance Committee on H.R. 10606, 87th Cong., 2d Sess. 113 (1962).

be able to attend school,[34] for example, and another hoped that the bill would enable unemployed breadwinners to take advantage of training opportunities.[35] A number of speakers alluded to the unfairness of denying aid to a family with two able-bodied parents unless one parent deserted, as had the President in his statement.[36] These persons expressed the hope that the AFDC-U program would result in more families staying together since benefits could now be obtained even when two able bodied parents were in the home and at least one was unemployed.

Claims that the bill would actually have this anti-desertion effect provoked some skepticism, however, since many states already provided general assistance to two-parent families. HEW Secretary Ribicoff, for example, who had mentioned the possible effect of AFDC-U in promoting family stability, was forced to admit that there was little or no "desertion incentive" in more than half of the states, including all of the populous states of the Northeast, because of the existence of state general assistance programs. 1961 House Hearings, *supra*, at pp. 100, 101. This lead Rep. Curtis to characterize the desertion argument as "phony," noting that he thought it "one of these kinds of arguments that are built up to support a move that is intended for entirely different reasons."

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[34] 107 Cong. Rec. 3761 (1961) (Perkins).

[35] 107 Cong. Rec. 3770 (1961) (Machrowicz).

[36] 107 Cong. Rec. 3765 (Baldwin), 3768 (McCormack), and 3769 (Ryan) (1961).

Id. at 262. He remained unpersuaded, see 1961 House report, *supra*, at 13, and the Report did not make any claim that the AFDC-U program would reduce desertion.

The Solicitor General places even greater reliance on Congressional intent in 1967, which he said focused entirely upon desertion. Indeed, the AFDC portion of the bill including the section on AFDC-U was considered that year against the background of mounting concern over the growth in the welfare rolls, the failure to eliminate the dependency of those on the rolls, and the problems of family dissolution (that is, desertion)[37] Congress attempted to address these problems directly in the legislation that emerged through provisions establishing work and training programs for recipients, providing a "work incentive" by disregarding part of recipients' earnings in determining grant amounts, strengthening the program for establishing paternity and securing the enforcement of child support obligations, and putting a "freeze" on the federal funds that would be provided for AFDC payments to children eligible because of the absence of a parent. Pub. L. 90-248, §§ 202, 204, 208, 211, 81 Stat. 881, 884, 894, and 896 (1968).

Those in Congress who were seeking to expand the coverage of the AFDC-U program against this background therefore chose to make their case by under-

[37] See House Report, *supra*, at 95-96; Senate Report, *supra*, at 145; 113 Cong. Rec. 10668 (Mills).

scoring the positive effects would have on family life and therefore expansion on minimizing costs over the long run. Thus, those who objected to the imposition of a prior attachment to the workforce test and to allowing states to continue to opt out of the AFDC-U program therefore invoked the specter of additional broken homes if Congress did not act. The Solicitor General, however, has misread the legislative history of these failed attempts at expansion as demonstrating that the purpose of section 407 as amended by a gender classification was to eliminate the structural incentive in the AFDC program for fathers to desert.

On the House side, the bill was reported out under a closed rule barring any amendments. One Congressman, Ryan of New York, offered an extremely lengthy statement criticizing a host of provisions in the bill, and it is to extracts from this statement that the Solicitor General particularly points this Court's attention. Yet Mr. Ryan was not speaking for the Committee on Ways and Means, of which he was not a member, nor was he describing for the House the purpose of its legislation, since he was opposing it.[38]

The Solicitor General can find no more succor in the debates on the Senate side, where he relies exclusively on statements by Senators Harris, Kennedy, and

[38] It would also appear that Mr. Ryan had not been accurately advised about the nature of the bill, since he began his discussion with the statement that it was his "understanding" that the bill would make the AFDC-U program mandatory on the states, when it clearly would not. 113 Cong. Rec. 23096 (1967).

Mondale, for all of these statements were made in support of changes in, or in outright opposition to, the bill. U.S. Brief, pp. 20, 21, 23. Although one change these Senators sought, the Harris amendment making the AFDC-U program mandatory on the states, passed the Senate, even that amendment was rejected in Conference.[39] 1967 Conference Report, *supra*, at 57. Thereupon all three Senators joined the small block of fourteen who voted against the Conference Report. 113 Cong. Rec. 36924 (1967). There is not one statement by the sponsors of the legislation, or those supporting it, identifying the purpose of the legislation as a deterrent to desertion.

The Solicitor General's sole remaining evidence that Congress specifically saw the deterrence of paternal desertion as the purpose of section 407 is a quotation of two sentences from the 1967 Senate Report. Those sentences must be seen in the context of what preceded and followed, however (material in italics not included in Solicitor's quotation):

> "*The program is optional with the States and currently 22 States, including nearly 60 percent of the population of the United States, have programs under the Federal legislation. Moreover, substantial numbers of similar families not living in those 22 States are receiving assistance under title V of the Economic Opportunity Act.*
>
> "The committee is concerned about the effect that the absence of a State program for unemployed fathers has on family stability. Where there is no such program there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance. *This will be a matter of continuing study by the committee.* 1967 Senate Report, *supra*, at 160.

[39] Senator Long, Chairman of the Finance Committee and well known for his concern over absent AFDC fathers and instrumental in the enactment of a more comprehensive child support program in AFDC, Pub. L. 93-647, Part B, § 101, 88 Stat. 2351 (1975), opposed the Harris amendment to make AFDC-U mandatory, acknowledging only that "[i]t is argued that the welfare law tends to work out, in that regard, as an incentive to break up families. . . ." 113 Cong. Rec. 33193 (1967).

This is not a statement of purpose, it is at best a statement of concern and continuing interest. If the Committee had mandated the AFDC-U program on all states it could be said that it had a purpose of removing the desertion incentive, but the Committee had explicitly rejected that course of action. In any event, the Senate Report, and the House Report for that matter, never suggested that the *gender discrimination* was introduced into section 407 as a means of addressing the problem of desertion.

A better guide to the Congressional intent with respect to desertion is found by looking at those portions of the 1967 legislation addressed specificly to that issue. For example, both the House and Senate Reports, under the heading "parental desertion," described the provisions in H.R. 12080 requiring states to establish programs to enforce child support laws against absent parents. See 1967 House Report, *supra*

at 102; 1967 Senate Report, *supra* at 160. The House Report also contained under that heading a limitation for federal funding in absent parent cases. The Senate version deleted this "freeze" provision on the ground that it was unnecessarily harsh and that other provisions, including the parental support provisions, would be adequate. 1967 Senate Report, *supra*, at 1663.[40] These sections indicate that when Congress wanted to address the desertion problem, it was able to state its intent plainly and, indeed, that it chose to legislate in a gender neutral manner.[41]

In sum, the legislative history plainly shows that in 1961 Congress adopted the AFDC-U program to meet the needs of families deprived of a breadwinner parent's support, and that this purpose was confirmed in 1967 when Congress decided to make the AFDC-U program a permanent part of the federal govern-

[40] The freeze provision was restored by the Conference Committee. 1967 Conference Report, *supra*, at 60-61.

[41] Confirmation that the Finance Committee was not addressing the problem of desertion through section 407 but through the child support program is found in a 1974 report:

> "The Committee has long been aware of the impact of deserting fathers on the rapid and uncontrolled growth of families on AFDC. As early as 1950, the Congress provided for the prompt notice to law enforcement officials of the furnishing of AFDC with respect to a child that had been deserted or abandoned. In 1967, the Committee instituted what is believed would be an effective program of enforcement of child support and determination of paternity."

S. Rep. No. 1356, 93rd Cong., 2d Sess. 44 (1974). No mention is made of the AFDC-U program as a means of responding to the Committee's concern.

ment's basic program for meeting the needs of dependent children and their parents. The Solicitor General's attempt to convert the hopes of many in the Administration and Congress that the AFDC-U program would reduce the incidence of desertion into a legislative purpose to address only the problem of desertion, and then only the problem of deserting fathers, finds no support in the statutory language, the Committee Reports, or the floor statements by Committee Chairmen, and cannot even be supported by the Committee witnesses and Members of Congress upon which he relies.

C. The Gender Classification Does Not Constitutionally Serve the Objective of the AFDC-U Program, Meeting Need in Two-Parent Families Caused by Unemployment.

As shown above, the purpose for the creation of the AFDC-U program in 1961 and for its extension in 1962 and 1967 was to provide for families "deprived of *parental* support" because of unemployment. Section 407(a), 42 U.S.C. § 607(a) (emphasis supplied). By focusing the program more precisely on employable persons in 1967 Congress confirmed, not repudiated, that the purpose of the program was to meet family need caused by the unemployment of a breadwinner.[42]

[42] There is nearly universal agreement that meeting needs of two-parent families suffering from unemployment is at least one of the purposes of the AFDC-U program. The District Court found it the "overriding goal" of the legislation. U.S.J.S., App., p. 24A. Appellant Sharp agrees. State Brief, p. 15.

The Solicitor General, however, disagrees, U.S. Brief, p. 29, n. 19. Yet two years ago he advised this Court that the purpose of

Classifying needy families solely on the basis of the sex of the unemployed wage earner and denying AFDC-U benefits to families whose unemployed wage earner happens to be female is totally unrelated to this purpose, however, for sex is simply not an accurate basis for determining whether or not there has been a loss of *parental* support caused by unemployment. Cf. *Orr* v. *Orr, supra*, slip. op. at 11. Cindy Westcott's and Susan Westwood's paychecks were just as essential to their families as they would have been had they been earned by their husbands.

In failing to protect needy families against the unemployment of wage earner mothers, Congress acted on the basis of the stereotypical view of two-parent families in which only the fathers are the providers whose unemployment causes a loss of "parental support," while mothers are housewives and not also

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the AFDC-U program was substantially the same as that for unemployment compensation. Memorandum for United States as Amicus Curiae, *Batterton* v. *Francis*, No. 75-1811, October 1976, p. 8. Certainly the Solicitor General was advising the Court then that the purpose of the two programs was to provide for income loss from unemployment and not to eliminate a structural defect in the AFDC program which results from the denial of benefits to most families in which both parents are in the home.

In any event, the Solicitor General's current claim that the 1967 Congress did not have any interest in meeting the needs of the unemployed but only in deterring paternal desertion is simply untenable, since the very method selected by Congress to achieve the Solicitor's asserted purpose was to meet subsistence needs of dependent children of unemployed fathers through the structure of a program inaugurated thirty-two years before to meet the subsistence needs of dependent children.

breadwinners. This is virtually the same "archaic and overbroad" generalization that was condemned by this Court in *Weinberger* v. *Wiesenfeld, supra*, namely, that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.* at 644. Similarly, the assumption in section 407 is similar to other assumptions regarding the roles of men and women previously struck down by this Court, such as assumptions that women are dependent on their husbands, while husbands are not dependent on their wives; *Frontiero* v. *Richardson, supra*; *Califano* v. *Goldfarb, supra*; *Weinberger* v. *Wiesenfeld, supra*; *Orr* v. *Orr, supra*; that women are destined to be homemakers and childrearers, while men's place is in the market place and world of ideas, *Stanton* v. *Stanton*, 421 U.S. 7 (1975); and that men are more experienced in business affairs than women, *Reed* v. *Reed, supra*, discussed in *Frontiero* v. *Richardson, supra* at 683-84. See also *Taylor* v. *Louisiana*, 419 U.S. 522, 533-36 (1975) (rejecting as justification for exclusion of women from jury service the argument that jury service would interfere with women's distinctive role as center of home and family life); *Duren* v. *Missouri*, No. 77-6067, 47 U.S.L.W. 4089, 4093 (1979).

The denial of AFDC-U benefits to unemployed female wage earners and their families was adopted in 1967 because Congress acted on the basis of a stereotypical view of two-parent families. This stereotype is

offensive because it enacts into law a narrow view of the family roles of men and women that is indifferent to an individual's choice about his or her role and to changing social patterns.[43] By making the term "de-

[43] Even if it were valid in 1967, Congress' stereotype is fast becoming a relic. The labor force participation rate of married women has soared dramatically from 21.6% in April 1950, to 30.5% in March 1960, to 45% in March 1976. In 1976, 46% of mothers were in the labor force, compared to 21.6% in 1950. "Labor Force Trends: A Synthesis and Analysis and a Bibliography," Special Labor Force Report 208, U.S. Dept. of Labor, BLS (October 1977) at 6. Over 50% of married women with a husband present and children under 18 were in the labor force in March 1978. Marital and Family Characteristics of the Labor Force, March 1978, U.S. Dept. of Labor, BLS (July 24, 1978) Table 5.

Women work for the same reasons that men do—to support their families. Indeed, the women who are most likely to provide substantial support for their families, namely women in lower income families, are the ones against whom § 407 operates. Thus, wives are more likely to contribute the major portion of family income in low income families than in higher income families. In 39% of families with incomes under $3,000, the wife contributed at least half the family's support, whereas in only 11% of families with incomes between $15,000 and $19,999 did the wife provide at least half the family's income. Marital and Family Characteristics of Workers, March 1977, Special Labor Force Dept. 216, U.S. Dept. of Labor, BLS, Table N.

In March 1975, over 800,000 wives with unemployed husbands and 1.8 million wives with husbands not in the labor force were working or looking for work. Many of these women were their family's only support. "Why Women Work", U.S. Dept. of Labor, Employment Standards Adm., Women's Bureau (Aug. 1978 revised) at 3. These figures simply confirm that mothers are indeed important family providers and underscore the harm worked by a legislative classification that refuses to acknowledge the importance of women's earnings to their families.

prived of *parental* support by reason of . . . unemployment" synonymous with "father," section 407 penalizes those who would depart from the role that Congress cast for them in 1967.[44]

The Solicitor agrees that Congress may not justify gender classifications by invoking "archaic or overbroad" generalizations about the wage earning roles of males and females, U.S. Brief at 28, but makes no attempt to show how the gender classification fairly serves the purpose of section 407, the protection of families in need because of a parent's unemployment. The reason for this silence is clear: there is no justification under the decisions of this Court. *Weinberger* v. *Wiesenfeld, supra*; *Califano* v. *Goldfarb, supra*; *Frontiero* v. *Richardson, supra.*

D. The Gender Classification Cannot Be Sustained On the Basis That It Fairly Serves A Governmental Objective Related Solely to Deterring Paternal Desertion.

Rather than attempt to justify the gender classification in light of section 407's objective of meeting

[44] Of course, the result of such a policy is to give credence to the notion that women are not family providers and to make even more difficult for those women who would be. As Mr. Justice Blackmun observed in *Stanton* v. *Stanton, supra*:

> ". . . if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." 421 U.S. at 15.

the needs of children, the Solicitor General argues that the 1967 decision to deny section 407 benefits to unemployed mothers should be sustained by this Court because providing such benefits solely on the basis of the unemployment of the father serves a valid governmental objective, indeed, as he would have it, the only objective for Section 407, "to eliminate the incentive for unemployed fathers to desert." U.S. Brief, p. 23.

The Solicitor is unable to show, however, that even if there were an anti-desertion objective, it was the narrow, gender-based one of deterring desertion by a father, not by either parent.[45] Moreover, even if he could show that Congress had such a narrow purpose, his argument fails because such a gender based objective for legislation is impermissible under the Fifth Amendment.

[45] To the extent Congress may have been addressing the purported desertion incentive through the AFDC-U program, its interest was to keep families together when unemployment hit, as the next section demonstrates. The Solicitor General's failure to discuss such a sex neutral anti-desertion legislative objective is implicit recognition that the gender classification cannot be sustained if the objective were to deter the desertion of either parent when a breadwinner becomes unemployed, since the classification rests on a dual sexual stereotyping of men as family breadwinners and as potential deserters when they become unemployed. Families who defy the stereotype because the mother is the unemployed wage earner are confronted with the very incentive that Congress was trying to eliminate, since the desertion of either parent, male or female, would qualify the family for AFDC. The gender classification in § 407 thus does not fairly serve the objective of keeping families together during the crisis of unemployment.

1. THE GENDER CLASSIFICATION IN SECTION 407 WAS NOT INTENDED TO SERVE A CONGRESSIONAL OBJECTIVE OF DETERRING DESERTIONS BY FATHERS.

This Court has insisted in gender classification cases upon a close review of the statute and legislative history to determine "the actual purposes underlying [the] statutory scheme," *Weinberger* v. *Wiesenfeld, supra*, 420 U.S. at 648, and to ascertain whether the classification is simply the result of "the role-typing society has long imposed," *Stanton* v. *Stanton, supra*, 421 U.S. at 15. Such an examination in the instant case demonstrates that Congress did not establish an objective in section 407, or anywhere else in the Act for that matter, of promoting family stability only when the potential desertion of the male parent was imminent.

First, as we have shown, Congress' consistent objective for the AFDC-U program has been to enable states to provide subsistence benefits to children made needy by parental unemployment. The 1961 and 1967 Committee Reports and floor statements of the bill managers do not show that § 407 generally, or the change from parent to father, was described to Congress as a measure to address desertion.[46] Any en-

[46] An important element of the Solicitor's argument, that Congress adopted the classifications relating to recent attachment to the workforce and availability for work in order to identify a "class of fathers especially subject to the pressure to desert," U.S. Brief, p. 33, is without foundation anywhere in the record.

couragement such benefits might have been thought to give to families to stay united was clearly an incidental beneficial effect of this essentially humanitarian legislation. In evaluating whether the gender classification serves the objective of the legislation, the possible effect on desertion is therefore simply irrelevant.

Second, insofar as it may be said that Congress was concerned with desertion at all in connection with the AFDC-U program, its concern was to keep families together, not whether it was the father or mother who deserted. The stated purposes of the AFDC program, including that of strengthening family life, are sex neutral, section 401 of the Social Security Act, 42 U.S.C. § 601. The supposed structural "incentive" to desertion is sex neutral as well, since section 406(a), 42 U.S.C. § 606(a), defines a dependent child as one

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The classifications were adopted, of course, to identify persons who were unemployed so that benefits would only go to the children of the unemployed. Indeed, Rep. Ryan, the Solicitor's primary spokesperson for the House of Representatives on the objective of section 407 undercut the Solicitor on this point by contending that the prior workforce attachment requirement was "clearly inconsistent with the proclaimed goal of the Committee—that of strengthening family bonds" because it "would exclude those families most in need of assistance unless the father leaves the home." 113 Cong. Rec. 23096 (1967). Compare *Weinberger* v. *Wiesenfeld, supra*, 420 U.S. at 647, in which this Court found that Congress' classifications of the mothers eligible for survivors benefits was consistent only with a purpose of allowing a parent to stay home and not with the Solicitor's asserted purpose of compensating women for the disadvantages they suffer competing in the market place.

whose *parent* is absent. Moreover, when Congress explicitly addressed the problem of parental desertion in other portions of the bill, it did so in a consistently sex-neutral manner. Finally, to the extent that the gender classification in section 407 may be said to speak to desertion it is simply another instance in which Congress has spoken in gender based terms even though its actual objective is broader and wholly unrelated to the sex distinction, see, *e.g.*, *Weinberger* v. *Wiensenfeld, supra*.[47]

Insofar as there was any discussion of desertion by fathers in connection with section 407, it was clearly in sex stereotyped terms. The Solicitor General rests his case concerning an exclusive purpose to deter desertion by fathers almost entirely on statements made during the 1961 and 1967 hearings and floor debates. There is not an iota of evidence, however, that these speakers had a "conscious purpose" to exclude families of unemployed mothers because of a decision that such families did not need or did not deserve an in-

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[47] In *Wiesenfeld*, the Court found that Congress had stated that the challenged statute was designed "*'with the purpose of enabling the widow to remain at home and care for the children.'*" *Weinberger* v. *Wiensenfeld, supra*, 420 U.S. at 649, quoting Final Report of the Advisory Council on Social Security 31 (1938) (emphasis supplied by the Court); see also 644 n. 13. The Court, however, identified the statutory purpose as the gender neutral one ". . . of enabling the *surviving* parent to remain at home to care for a child . . ." and in light of this purpose found the gender classification "entirely irrational." *Weinberger* v. *Wiensenfeld, supra*, 420 U.S. at 651. (emphasis supplied).

centive to remain together. See *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 221 (Stevens, J. concurring).[48]

Rather, these debates show that the legislators simply responded to the problems of unemployment and desertion by speaking in sexually stereotypical terms of fathers as the parent who in fact most frequently left home and who traditionally were the wage earners whose unemployment created the crisis. Of course, these references are plainly part of the "baggage of sexual stereotypes," *Orr* v. *Orr*, *supra*, slip. op. at 14, in which fathers are viewed as the ones with "primary responsibility to provide a home and its essentials," *Stanton* v. *Stanton*, *supra*, 421 U.S. at 10, and the ones who will flee when they are unable to fulfill the role; mothers, on the other hand, are not breadwinners, but rather the "center of the home and family life." *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 533, n. 15, quoting *Hoyt* v. *Florida*, 368 U.S. 57 (1961) who will surely not flee. Such stereotypical thinking cannot be the basis for the conclusion that the actual Congressional concern was preservation of family sta-

[48] Maternal desertion was hardly unknown, however. In 1961 there were 24,300 AFDC cases in which the mother had deserted, and in 1967 there were 41,038, in each year about 3% of the caseload. In some cases there were fathers in the home, and in others the children were left in the care of another relative. "Study of Recipients of Aid to Families With Dependent Children, November-December, 1961: National Cross Tabulations," HEW, Division of Program Statistics and Analysis, Table 19 (1965); "Findings of the 1967 AFDC Study: Data By State and Census Division, HEW, National Center for Social Statistics, NCSS Report AFDC-3(67), Table 38 (1970).

bility only when it was the father who might leave home.

Third, the Court should not find that deterring desertion by fathers was the purpose of the 1967 legislation because, as in *Orr* v. *Orr*, *supra*, slip. op. at 13, the "use of a gender classification actually produces perverse results in this case." Thus a mother's unemployment may lead to a father's decision to desert no less surely than would his own unemployment. Indeed, as the District Court noted, William Westcott was actually encouraged by his landlord to desert in order to qualify his family for benefits once Cindy Westcott became unemployed. U.S.J.S., App., at p. 27A, n.16. Since in this case it has become "clear that there is no substantial relationship between the statutes and their purported objectives," that is, the objective of deterring paternal desertion, the Court must determine "that these objectives were not the statute's goals in the first place." *Orr* v. *Orr*, *supra*, slip op. at 11, n. 10.

2. Even If a Congressional Objective Were Specifically to Deter Desertion by Fathers, Such a Legislative Objective is Impermissible under the Fifth Amendment.

The other reason why the Solicitor General's argument must fail is that even if a Congressional purpose behind § 407 were to provide for unemployed fathers because they were more likely to desert than

unemployed mothers, such a gender-based purpose founded solely on sex stereotypes could not sustain the gender classification in § 407. As the Court held earlier this Term in striking down a sex-biased alimony statute, "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role," can not justify a statute allocating benefits and burdens on the basis of gender. *Orr* v. *Orr, supra*, slip. op. at 10, citing *Stanton* v. *Stanton, supra*, 421 U.S. at 10; *Craig* v. *Boren*, 429 U.S. at 198.

According to the Solicitor General, Congress imposed the gender classification in the AFDC-U program because of its conclusion that women are less likely to desert than are men.[49] As with other sexual

[49] The Solicitor claims that the gender classification is not based on sex stereotypes, however, but "solid statistical evidence." U.S. Brief at 33. Thus, since HEW data on families receiving AFDC under § 406 showed that fathers deserted more frequently than mothers, Congress could constitutionally decide to give an incentive only to unemployed fathers. It is in the very nature of a stereotype, however, that there is likely to be "solid statistical evidence" to back it up. The fact that there is an empirical basis for the sterotype does not make it constitutionally acceptable; indeed, the statistics probably gave at least some credence to the stereotype underlying every sex classification which this Court has held invalid. In *Weinberger* v. *Wiesenfeld, supra*, 420 U.S. at 646, for example, the Court noted that "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support." In *Califano* v. *Goldfarb, supra*, the Court invalidated a Social Security proof of dependency requirement imposed on widowers but not widows even though it appeared that 90% of wives were dependent while only 1% of husbands

stereotypes, the effect is to injure women by making it more difficult for them to remain at home. Congress has simply refused to recognize the economic pressure on female parents caused by their unemployment, while acknowledging the pressure on men and providing benefits under section 407. The Act therefore denies women the financial support provided men to enable them to remain with their children and spouse in the family home, enjoying the "constitutionally protected right to the 'companionship, care, custody, and managment'" of their own children. *Weinberger* v. *Wiesenfeld, supra*, 420 U.S. at 653, quoting *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972).[50]

Indeed, significant numbers of mothers who do not fit the sexual stereotype have deserted families which have then qualified to receive AFDC benefits, as we have shown at note 48, *supra*. Thus the unemployment of a mother may in some cases result in the mother's desertion, as where the family is already living with the father's family, where the mother rath-

were. 430 U.S. at 220, n. 5 (Stevens, J. concurring) and 238-39, n. 7 (Rehnquist, J. dissenting). Moreover, this Court has been reluctant even to look to statistics to justify classifications since it is "dubious business . . . that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig* v. *Boren, supra*, 429 U.S. at 204.

[50] Certainly no claim is made that the exclusion of maternal unemployment from § 407 is based on considerations of administrative convenience, *Califano* v. *Goldfarb, supra*, at 219 (*Stevens*, concurring), 238 (Rehnquist, dissenting), or that it was intended to compensate women wage earners for past unfair treatment. *Califano* v. *Webster*, 430 U.S. 313 (1977).

er than the father has better prospects in another city, or where the mother simply reaches the breaking point first.

The Solicitor General acknowledges that "family life is a basic part of our cultural heritage, and governmental action should not cause its dissolution," U.S. Brief, p. 35, citing *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). We could not agree more. Since the gender discrimination in this case is apparently designed, if the Solicitor General is right, to enable the father but not the identically situated mother to forego abandonment of the family unit, it results in the denial of benefits solely on the basis of sex and denies mothers the equal protection of the law as secured by the Fifth Amendment.

II. THE DISTRICT COURT CORRECTLY ORDERED THAT AFDC-U BENEFITS BE EXTENDED TO FAMILIES IN WHICH THE MOTHER SATISFIES ALL OF THE CONDITIONS OF SECTION 407.

The remaining issue in this case, raised only by the State of Massachusetts in No. 78-689, is whether the relief granted by the District Court was proper. In Part A of this section we show that the District Court correctly extended AFDC-U benefits to Appellees rather than invalidate the entire AFDC-U program. In Part B we show that the alternative of restructuring the program into a "principal wage earner model" is inconsistent with the structure and history of the

AFDC-U program and poses numerous questions that are beyond the competence of this Court to resolve. We therefore join the federal Appellee in seeking affirmance of the remedy ordered by the court below.

A. Extension of AFDC-U Benefits to Families of Unemployed Mothers, Not Invalidation of the Entire AFDC-U Program, is the Proper Remedy In This Case.

"Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring). The choice between these remedies depends upon the court's perception of "Congress' wishes" as expressed in the statute itself, "the intensity of [Congress'] commitment to the residual policy" of the statute, and "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 365. These factors demonstrate that the remedy ordered by the District Court in this case is fully consistent with "Congress' wishes" and should be affirmed.

1. CONGRESS HAS CLEARLY STATED THAT EXTENSION IS PROPER WHERE PROVISIONS OF THE SOCIAL SECURITY ACT ARE INVALIDATED.

Section 1103 of the Social Security Act, 42 U.S.C. § 1303, provides:

> If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.[51]

Consistent with this provision, this Court has uniformly extended benefits whenever a provision of the Social Security Act has been found unconstitutional. *Califano* v. *Jablon, supra*; *Califano* v. *Goldfarb, supra*; *Weinberger* v. *Wiesenfeld, supra*; *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974); *Cf. United States Dept. of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Section 1103 and this Court's prior Social Security Act decisions make clear that given a choice between

[51] This provision is identical to the severability clause which Mr. Justice Harlan found " 'discloses an intention to make the Act divisible, and creates a presumption that, eliminating invalid parts, the Legislature would have been satisfied with what remained,' " *Welsh* v. *United States, supra,* 398 U.S. at 364 (Harlan, J. concurring) quoting from *Champlin Rfg. Co.* v. *Corporation Commission,* 286 U.S. 210, 235 (1932).

denying benefits to clearly eligible persons who may desperately need them and extending coverage to a new group not included by Congress, courts should extend benefits, leaving it to Congress to make any needed adjustments. As of July 1978 there were 290,525 children and 220,102 parents in 26 states, the District of Columbia, and Guam receiving AFDC-U benefits,[52] and undoubtedly an even larger number receiving Medicaid on the basis of meeting AFDC-U categorical requirements. Social Security Act § 1902(a)(10)(C)(i), 42 U.S.C. § 1396a(a)(10)(C)(i). Invalidation of the entire AFDC-U program would cause the most severe and irreparable injury to these families.[53] Extension, on the other hand, would protect these needy families in the short run, while still permitting Congress to make any needed adjustments in the future.

These considerations are even more persuasive in this case than in earlier Social Security Act cases because of the optional nature of the AFDC-U program, see *Batterson* v. *Francis, supra,* 432 U.S. at 420. While extension may require some states to cover

[52] 42 Soc. Sec. Bull. 78 (January 1979).

[53] Senator Ribicoff, urging a one year extension of the AFDC program pending further action in 1967, noted that there were then 403,000 persons in 22 states receiving benefits, and continued: "If these payments stop, even temporarily, severe hardship to these individuals will result." 113 Cong. Rec. 17498 (1967). As noted in the discussion of the legislative history, Senator Kuchel said that "complete termination of the program" would be "the ultimate disaster." Id.

more families than when they adopted the program, any state that finds the additional coverage to be unacceptable may drop out of the AFDC-U program entirely. Invalidation, on the other hand, would eliminate the program in those states that desire to cover the new group along with those families already receiving AFDC-U.[54]

2. Extension of Benefits is Consistent with the History, Purposes, and Structure of the AFDC-U Program.

The gender discrimination adopted in 1967 received no attention from Congress, as we have shown in Point I.B., and was not important to the other legislative changes made in that year. Since AFDC-U was previously enacted and extended two times as a sex-neutral program, Congress could hardly have preferred to abandon the AFDC-U program rather than allow unemployed mothers to establish eligibility.[55] In contrast, the Congressional commitment to aiding families made needy by unemployment has continued uninterrupted since 1961,[56] and has multiplied in re-

[54] Pennsylvania, for example, supports extension. Opposition to Amicus Curiae, Commonwealth of Pennsylvania, to Appellant Califano's Application for a Stay Pending Appeal, *Califano* v. *Westcott*, No. 78-437.

[55] The possible effect which some speakers during the floor debate felt that AFDC-U benefits could have on family stability is also served only by extension of benefits, of course.

[56] When a one year extension had to be rused through in June 1967, Senate Majority Leader Mansfield "extended the gratitude of the entire Senate" to the Senators who took the lead "for their foresight and diligent efforts to assure that these vital assistance programs will not expire."

cent years.[57] Moreover, the provision of benefits on a sex neutral basis is in harmony with the balance of the AFDC program which, since 1935, has provided benefits on the basis of the death, absence, or incapacity of *either* parent. Section 406(a), 42 U.S.C. § 606(a).

Appellant Sharp nevertheless argues that extension will "work a fundamental change in this nation's system of public assistance [by providing] a guaranteed annual income to all needy families, including the so-called working poor." State's Brief, p. 15. If this were so, it would certainly suggest a radical change in the structure of the program which would likely be far from Congress' wishes. There will be no such revolution, however. Under the District Court's order of extension, a parent seeking to qualify a family for AFDC-U benefits will still have to meet each of the requirements for AFDC-U eligibility, including the prior work attachment rule and the federal definition

[57] Total AFDC-U payments to recipients, to which the federal government contributed more than half of the cost, rose from $163 million in 1967 to $439 million in 1975, $588 million in 1976, and $606 million in 1977. (Figures obtained by combining monthly payments as reported in 5,6 Welfare in Review, Table: AFDC-UP Segment . . . [May 1967-April 1968], and HEW, SRS, NCSS Report A-2, Public Assistance Statistics [Monthly], Table: AFDC-UP Segment . . . [1975-1977]).

of unemployment.[58] Rather than making all needy families eligible, extension will permit coverage of only a small portion of needy families.[59]

In addition, Appellant Sharp expresses concern that families may remain on the rolls while working[60] as the result of a provision governing the entire AFDC program, the earned income disregard in section

[58] Thus, under the District Court's order of extension, a parent seeking to qualify a family for AFDC-U benefits will still have to:

- be totally unemployed or employed less than 100 hours per month, 45 C.F.R. § 233.100(a)(1)(i);
- have earned $50 or more in six out of 13 calendar quarters during any period ending within one year prior to application, or have received or qualified for unemployment compensation within such one year period, 42 U.S.C. § 607(b)(1)(C);
- have been unemployed for 30 days prior to the receipt of AFDC and not have refused a bona fide job offer without good cause within such 30 day period, 42 U.S.C. § 607(b)(1)(A), (B); and
- meet certain work registration requirements, 42 U.S.C. § 607(b)(2)(C).

[59] See *Batterton* v. *Francis*, *supra*, 432 U.S. at 427-28 ("Indeed, the other provisions of § 407 impose similar limitations, indicating that the AFDC-UF program was not intended to provide assistance without regard to the reasons a person is out of work"); *Macias* v. *Finch*, 324 F. Supp. 1252 (N.D. Calif. 1970), *aff'd. sub. nom. Macias* v. *Richardson*, 400 U.S. 913 (1970) (100 hour rule sustained against challenge that many fathers working more than 100 hours were still not earning enough to meet their families' needs and should be considered unemployed).

[60] Of course, families may continue to receive AFDC-U benefits now even if the father is working 99 hours a month. 45 C.F.R. § 233.100(a)(1)(i).

402(a)(8), 42 U.S.C. § 602(a)(8) added by Congress in the 1967 amendments at issue herein. Brief, pp. 29-33. Congress recognized that the disregard would result in some working families continuing to receive benefits when it adopted the disregard in 1967,[61] but obviously believed that it was more important to reward AFDC-U and other AFDC families for obtaining employment. Congress has held firm to the full earned income disregard over the years despite showings that some families may continue to receive AFDC benefits while the parent worked full-time.[62] The fact that some families who obtain employment may still qualify for benefits of the disregard is therefore in complete harmony with the overall structure of the AFDC program.[63]

[61] See, *e.g.*, 1967 Senate Report, *supra*, at 159.

[62] "[S]ome states have complained that the lack of an upper limit on the earned income disregard has the effect of keeping people on welfare even after they are working full-time at wages well have the poverty line. The committee bill would deal with [this problem] by modifying the earnings disregard formula. . . ." S. Rep. No. 1431, 91st Cong., 2d Sess. 351 (1970).

[63] Appellant Sharp also suggests that an extended AFDC-U program is out of harmony with the Act because families in which the parents are "chronically subject to intermittent employment" may, as the result of "economic circumstance," remain eligible for AFDC-U benefits upon the unemployment of one parent and then upon the other. State's Brief, pp. 28-29. Need arising from unemployment due to economic circumstance was precisely what motivated President Kennedy to propose, Congress to adopt, the AFDC-U program in 1961.

3. The Extra Costs Caused By Extension Do Not Demonstrate That Congress Would Prefer Invalidation of the Entire AFDC-U Program.

An extraordinary increase in the costs of a federal program might suggest a Congressional preference for invalidation of that program. Here, however, no such extraordinary increase has been shown.

First, there is no evidence that the increase in cost that would be attributable to the District Court's order is so great as to raise a question as to Congressional intent. The federal government,[64] on which the largest financial burden would lie, stated below that it would be "speculative to estimate any increase in cost,"[65] and argues to this Court that extension is the appropriate remedy if the gender classification in section 407 is unconstitutional. Brief for the Federal Appellee, No. 78-689, p. 10. Moreover, as we have shown in Point I, and as Massachusetts itself recognized in the District Court, there is "no [basis for] inference . . . that Congress considered the cost of sex-neutral AFDC-U program to be prohibitive"[66] when it adopted the sex discrimination provision in 1967.

[64] As noted earlier, states that find the cost of increased coverage to be too great may drop out of the program entirely.

[65] Defendant Califano's Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment 11, August 22, 1977 (R.20).

[66] Defendant Sharp's Memorandum in Support of His Opposition to Plaintiffs' Motion for Partial Summary Judgment 17-18, Oct. 21, 1977 (R.24).

Second, the basis for the State's cost projection is highly suspect. The State reaches its estimate that 10,000 new families would become eligible, and 5,000 would begin receiving benefits the first year, by making extrapolations upon extrapolations based on little more than hunches, such as an assumption that one out of two eligible families would actually apply for AFDC-U benefits under a sex-neutral program, while only one out of four families eligible now applies for AFDC-U (A.52). In fact, the class is likely to be considerably smaller. The District Court, for example, found that the class likely consisted of 148 families and would not exceed 346 families (U.S.J.S. App. 14A, 15A, n. 8). Similarly, in an identical case in Ohio, where the AFDC-U program is twice as large as the Masschusetts program,[67] the district court found that the class "probably numbers in the tens or even hundreds."[68]

Third, even the exaggerated estimates relied upon by Massachusetts are not great in comparison to the costs of the entire AFDC program, which is now running at about $480 million a year in Massachusetts.[69] Even if Appellant's estimate of a $7 million dollar increase in AFDC costs in the first full year of implementation is accepted, A. 50-53, the increase would

[67] 42 Soc. Sec. Bull. 78 (1979).

[68] *Stevens* v. *Califano,* Civ. Act. No. 77-103A, N.D. Ohio, Class Action Certification Order, November 1977, p. 6 (appeal docketed *sub nom. Califano* v. *Stevens,* No. 78-449).

[69] 42 Soc. Sec. Bull. 77 (1979) (monthly figure multiplied by 12).

be equal to 1-1/2 percent of total AFDC costs. Similarly, the Secretary of HEW has estimated for purposes of this case (and without any justification or explanation whatever) that total federal and state AFDC-U benefit expenditures for all participating states would increase by $244.3 million,[70] or just over 2% of current AFDC expenditures of $10,741 million.[71] Extension in this case would therefore be far less expensive in total dollars, and little more expensive in comparative terms, than the extension in *Califano* v. *Goldfarb, supra.* In that case, the Solicitor General informed the Court that extension would cost $447 million, Brief of United States, *Califano* v. *Goldfarb,* No. 75-699, p. 5A,[72] or somewhat more than one half of one percent of all Social Security benefits

[70] This Court has an independent basis to question the validity of the Secretary's estimates, for the Secretary's attempts to use those estimates to determine the cost of extension in Pennsylvania were reflected by the State of Pennsylvania. That State, which provides benefits under its general assistance program similar to those which would be provided in a sex-neutral AFDC-U program, and is therefore already providing benefits to the families that would become eligible for AFDC-U, has advised this Court that Appellant Califano's cost estimates for a sex-neutral extension of Pennsylvania's AFDC-U program are exaggerated by a factor of *three.* Opposition of Amicus Curiae, Commonwealth of Pennsylvania, to Appellant Califano's Application for a Stay Pending Appeal, No. 78-437, Jan. 2, 1979, p. 5.

[71] See Note 69.

[72] The Solicitor argued that a holding that the gender classification was unconstitutional would "irrationally impose a further burden upon the already overstrained financing for the social security system," Brief of United States, *Califano* v. *Goldfarb,* No. 75-699, p. 39.

paid.[73] It will also have no more impact on costs than the actual increase in costs in the last three years, during which AFDC-U benefits climbed from $326 million to $605 million.[74]

In sum, extension is the appropriate remedy in light of the Congressional commitment to the AFDC-U program as evidenced in the statute and its legislative history, and because the costs of extension is clearly not great enough to require invalidation of the entire AFDC-U program.

B. Restructuring the AFDC-U Program To Meet Appellant Sharp's View Of An Optimal Program Is Not A Remedy Available To The Court.

Appellant Sharp urges this Court to avoid the choice between extension of benefits to the excluded class and invalidation of the AFDC-U program by adopting a completely new and untested approach to AFDC-U, a "principal wage earner model" for the AFDC-U program, State's Brief, p. 8. Under this

[73] In 1977, cash benefits under the Social Security (OASDHI) program totalled $84.3 billion. 42 Soc. Sec. Bull. 59 (1979). Similarly, the Solicitor advised the Court that the cost of the relief granted on statutory grounds in *Philbrook* v. *Glodgett, supra,* would be $3 million in Vermont's AFDC-U program for 1975. Brief of United States, *Philbrook* v. *Glodgett,* No. 74-132, p. 26. Total AFDC-U expenditures for that year were less than $4.2 million. HEW, SRS, NCSS Report A-2, *Public Assistance Statistics,* Jan.-Dec. 1975, Table 5.

[74] HEW, SRS, NCSS Report A-2, *Public Assistance Statistics,* Jan.-Dec. 1974, 1977, Table 5.

"model," benefits would be *extended* to some members of Appellee class, *denied* to other members of Appellee class (including the Westcotts, since Cindy Westcott is still unemployed but the State now considers William Westcott the principal wage earner) and denied to some current recipients.[75] Since some current recipients would lose eligibility, and some class members denied relief, an inexpensive compromise mixing both extension and invalidation would be achieved.

The Court should adopt this compromise, the State says, because surely this is what Congress would have done under the circumstances. It is not enough in this case to discern whether extension or invalidation "*more nearly accords* with Congress' wishes," *Welsh* v. *United States, supra*, 398 U.S. at 355 (Harlan J. concurring) (emphasis supplied); the Court must move in and re-write the Act as it believes *most nearly accords* with Congress' wishes.[76]

This Court has never to Appellees' knowledge embarked upon such an adventure before.[77] Recognizing

[75] Appellant Sharp concedes that some current recipients will be terminated if the remedy he seeks is granted. State's Brief, p. 36, n. 67; p. 40, n. 83

[76] The State initially argued for extension, and only adopted its current position in favor of restructuring some time after the District Court had entered summary judgment. See, *e.g.*, A. 44-45,63.

[77] Appellant Sharp can cite no precedent for such action in this Court or the lower courts, and none of the cases relied upon are pertinent. *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963) upheld a statute, noting that the Court should not become involved in

the perils of attempting to fathom, many years after the fact, what Congress might have done if it had known it could not do what in fact it decided to do, the Court has chosen to stay within the channels originally carved by Congress, either by extending coverage to the excluded class, or, more rarely, by invalidating an entire statute, *Cf. Orr* v. *Orr, supra*, No. 77-1119, slip op. at p. 3. For these and other reasons, the restructuring approach urged by the State should not be adopted here.[78]

judging the wisdom of legislative policies. *Moss* v. *Secretary of Health, Education, and Welfare*, 408 F. Supp. 403 (M.D. Fla. 1976), which was not a class action, held that extension of benefits to the excluded class, or of the dependency test to the automatically included class, was inappropriate. The Court did not engage in any restructuring of the program. Moreover, the holding in *Moss* was overruled by *Califano* v. *Goldfarb, supra*, and the parties stipulated to a dismissal of the action based on an award of benefits to the plaintiff. Civ. Act. No. 74-221, M.D. Fla., July 28, 1977. *United Low Income, Inc.* v. *Fisher*, 340 F. Supp. 150 (D. Me. 1972), *aff'd.* 470 F.2d 1074 (1st Cir. 1972), was an unsuccessful challenge to a state decision to opt out of the AFDC-U program, and therefore does not address restructuring as an alternative. The other Supreme Court cases cited in Appellant's Brief, p. 13, n. 17, involved court orders remedying school segregation, not classifications in legislation.

[78] A similar opportunity for restructuring was present in *Califano* v. *Goldfarb, supra*, but declined by the Court. In that case the Solicitor General advised the Court of two groups of men who would benefit from extension. The two groups were around the same size, but the first group was clearly deserving of the benefits, while the second group would be receiving a windfall. In addition, most of the cost from extension would be attributable to the benefit payments to the second group. Brief of the United States, No. 75-699, pp. 36-38. Since some wives and widows were currently receiving benefits under the windfall cate-

1. THE PRINCIPAL WAGE EARNER TEST IS NOT CONSISTENT WITH THE STRUCTURE OR HISTORY OF THE AFDC-U PROGRAM.

The most obvious objection to the principal wage earner test is that, as Massachusetts is forced to admit,[79] it would deny AFDC-U benefits to families who are currently eligible for the program. The newly excluded would be all currently eligible families in which the unemployed father is not the principal wage earner, a group which according to data presented by Massachusetts constitutes 29% of the caseload.[80]

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gory, restructuring would have had the further beneficial effect of eliminating these benefits as well.

Despite the savings that would have been achieved by partial extension to the first group only, there is no indication that the Solicitor General or the Court ever considered this "moderate" remedy appropriate for the Court. Instead, it was recognized that such restructuring of the Social Security program had to be left to Congress, since there were simply too many questions which were beyond the competence of the Court to address. When Congress did address this issue, it made a host of specific policy decisions and provided for a five year transition period so as not to disappoint persons nearing retirement who were expecting to receive "windfall" benefits. A special separability clause was added providing that invalidation of any aspect of the transition period would invalidate the entire transition provision but not the offset provision. Pub. L. 95-216 § 334, 91 Stat. 1544 (1977).

[79] State's Brief, p. 36, n. 67; p. 40, n. 83.

[80] The State reports that fathers are not the principal wage earner in 29% of all low-income two-parent families. A. 55. The newly ineligible families could be those in which the unemployed father who had qualified the family for aid did not satisfy the State's new principal wage earner test, and the mother could not qualify the family because she could not satisfy the federal definition of unemployment because of a lack of a prior work history or current employment.

Denying aid to these families, as proposed by Massachusetts, is inconsistent with section 1103 of the Act, 42 U.S.C. § 1303, which preserves benefits for innocent eligible recipients when a provision of the Act as applied to other persons is held invalid, and section 1104, 42 U.S.C. § 1304, under which "[T]he right to alter, amend or repeal any provision of this Act is hereby reserved to the Congress." Denying aid to such families also conflicts with section 402(a)(10), 42 U.S.C. § 602(a)(10), which guarantees benefits to all persons who fit within the federal statutory standards. See *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) (states may not deny aid to federally eligible persons "in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history.")[81] Massachusetts cannot use the decree in this case as an excuse to accomplish what it is forbidden to do directly by legislation or regulation.

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[81] The Solicitor General supports this interpretation of § 402(a)(10) of the Act. Brief of the Federal Appellee in No. 78-689, p. 8. He also makes the obvious point that the Secretary may address any problems arising from this Court's decision by adopting regulations to the extent they are consistent with the Act, or by seeking remedial legislation to the extent changes are not permitted by law or he desires further Congressional guidance. *Id.* at 9. Whether the Secretary could use his rulemaking power to define unemployment in order to adopt a principal wage earner test without further legislation is an issue not raised by the Solicitor General or otherwise before this Court, although we would contend that such action would not be permissible under the Act and its legislative history.

Even if the principal wage earner test does not exclude otherwise eligible families, there is nothing to suggest that Congress would adopt such a test, for Congress has never relied upon the wage earner status of a parent to determine eligibility for the AFDC or AFDC-U programs. Thus, one-parent families are eligible for the basic AFDC program when either of the parents is dead or absent, and two-parent families are eligible when either of the parents is incapacitated, without respect to whether the dead, absent, or incapacitated parent was, or is, the principal wage earner, however defined. § 406(a), 42 U.S.C. § 606(a). Similarly, for purposes of the AFDC-U program, the principal wage earner status of the unemployed parent (until 1967) or unemployed father (post-1967) has never been a condition for receiving benefits.

Contrary to Appellant Sharp's contention, the legislative history of AFDC-U also provides no support for the principal wage earner test. The frequent references in the 1961 debates to protecting breadwinners, on which Appellant Sharp relies, do not show that Congress meant to preclude benefits to two-worker families. Rather, as we have already noted, Congress seems to have been largely unaware of women's role in helping to support their families and therefore simply did not consider the two-worker family.[82]

[82] Appellant Sharp points out that minority members of the Ways and Means Committee expressed opposition in 1961 to providing special unemployment compensation benefits to supplementary wage earners, State Brief, p. 20, n. 33. But the majority of the Committee obviously did not agree with respect to unemployment compensation, and the minority never even raised this objection with respect to AFDC-U.

More importantly, there is no evidence, and Appellant points to none, that the gender classification was introduced in 1967 in order to impose a principal wage earner test. The statement in the Committee Reports concerning the gender change, which said that the "bill would not allow" states to provide aid to "families in which the father is working and the mother is unemployed," 1967 House Report, *supra*, at 108, offers, as the District Court found, "no clear explanation." U.S. J.S., App. p. 26A. If Congress were indeed concerned with the unemployment of the principal wage earner, it surely would have expressed itself more clearly than in this cryptic statement.[83]

Thus, the principal wage earner model results in the denial of benefits to eligible persons, is inconsistent with the basic structure of the AFDC program since 1935, and is not supported by the legislative history of section 407. There is therefore no legal basis for such a test.

2. This Court Should Not Make The Many Legislative Judgments Necessary to Rewrite The Act As Appellant Suggests.

Adoption of a principal wage earner eligibility condition would also require the Court to make numerous

[83] It does not appear, and Appellant Sharp does not suggest, that Congress considered two wage earner families or that the terms "breadwinner" or "principal wage earner" were used anywhere in the 1967 legislative history.

legislative judgments that are not within its delegated powers under Article III. For example, as noted earlier, the principal wage earner test would result in the denial of AFDC-U benefits to persons who are now eligible. Depending upon the number of such families, Congress might elect to apply any new requirement only to new applicants, or it might allow current eligibles a grace period before withdrawing benefits. Of course, neither of these options is available to this Court.

Similarly, the definition of the term principal wage earner, which is crucial to Appellant Sharp's proposal, involves many different policy options which only Congress is competent to address. For example, should the principal wage earner be defined on the basis of a longer or shorter time period than the six months proposed by Massachusetts? (State J.S., App., p. 8a). The result may affect the eligibility of families involved in seasonal employment or in short or long term training programs. Should principal wage earner status be measured by hours, which favors the less skilled, or earnings, favoring the more skilled, as Massachusetts proposes? *Id.*, p. 7a. Should the principal wage earner be defined in the same manner as dependence is defined elsewhere in the Social Security Act, in order to promote uniformity in that Act, or to mesh with standards for eligibility for publicly funded jobs under the Comprehensive Employment and Training Act intended for the same general class of persons for whom AFDC-U funds are made

available? See, *e.g.*, Pub. L. 95-524, § 607, 92 Stat. 2009 (1977) (eligibility for public service employment positions under Title VI of the Comprehensive Employment and Training Act based on, *inter alia*, low family income over a three month period).

In addition, many of these questions would have been resolved by Congress in 1967, and would again be resolved, in the course of determining desirable funding levels for public assistance programs and the extent to which structural reforms should be made. The Court's restructuring of the program would have to take place without the benefit of Congressional thinking on these vital issues as they relate to a principal wage earner test, however, particularly since Congress did not adopt such a test in the first place.

Finally, the restructuring approach suggested by Massachusetts requires the Court to predict how Congress would resolve additional sensitive political issues that Congress itself has not clearly considered with respect to the public assistance programs. The role of the female parent as a significant wage earner in low income households has changed dramatically since 1967, as has public awareness of the value of women's work.[84] To the extent that a principal wage

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[84] Certainly federal policy as a whole has been moving away from application of principal wage earner tests as the discriminatory impact they have had upon women has been recognized. Thus the Secretary of HEW, charged broadly with the responsibility for promulgating regulations to end sex discrimination in federally funded educational programs and activities, has in-

earner test would fall most heavily on women workers, it would deny aid to persons who are now recognized as having suffered past and current discrimination in the marketplace. It would be highly inappropriate, if not impossible, for this Court to predict how Congress would react to these changed conditions when faced with the need for a gender-neutral AFDC-U program.

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terpreted that mandate by forbidding "any policy . . . based upon whether an employee or applicant for employment is the . . . principal wage earner. . . ." 45 C.F.R. § 86.57, interpreting 20 U.S.C. § 1681, 86 Stat. 373 (1972).

Similarly, Equal Employment Opportunity Commission regulations prohibit employer distribution of benefits to "principal wage earner[s]" only on the ground that such a classification is a "prima facie violation of the prohibitions against sex discrimination" contained in 42 U.S.C. § 2000e-12. 29 C.F.R. § 1604.9(c). See also Wage and Hours Administrator Opinion Letter No. 1275 (WH-223), Jan. 15, 1973, CCH Labor Law Reporter Transfer Binder ¶ 30,873 ("The policy of making pay differentials based on 'head of family' or 'principal wage earner' status results in equal pay violations when the inevitable effect of the policy is to pay women less than men performing equal work.")

CONCLUSION

The judgments of the District Court appealed from in Nos. 78-437 and 78-689 should be affirmed.

Respectfully submitted,

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